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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 1458

DOROTHY COSTEN, WIFE OF AND
WESLEY W. NELSON,

Petitioners,

versus

HIRSCHBACH MOTOR LINE AND HARTFORD
ACCIDENT AND INDEMNITY COMPANY,

Respondents.

OPPOSITION OF HIRSCHBACH MOTOR LINE and HARTFORD ACCIDENT AND INDEMNITY COMPANY, RESPONDENTS-OPPONENTS TO THE APPLICATION FOR WRITS OF CERTIORARI ARD REVIEW.

MAY IT PLEASE THE COURT:

Counsel for opponents to the application for Writs of Certiorari and Review in this Court, would not ordinarily file an opposition to the application for review as we feel the case as presented to this Honorable Court is sufficient unto itself to refute applicants' position.

However, as applicants herein sought for the first time to introduce into this proceeding in their petition for a rehearing in the Fourth Circuit, Court of Appeal for the State of Louisiana, questions as to the consti-

tutionality of the actions of said Court of Appeal in rendering its judgment reversing the verdict and judgment below, and of the constitutional and statutory provisions of the State of Louisiana upon which this appellate decision was rendered as being in conflict with the 7th Amendment to the Constitution of the United States as amended by the 14th Amendment thereof, and has again raised these questions of those constitutional violations in this Court, we feel that this appearance in opposition thereto is proper.

For the convenience of this Court, we quote from Article 7 (Section 29) of the Constitution of Louisiana for the year 1921, as it has been amended (Act 561 of 1958):

"Sec. 29. Appellate and supervisory jurisdiction.

Section 29. Any provision of this Constitution or law to the contrary notwithstanding, the courts of appeal have appellate jurisdiction of the following cases of which the Supreme Court is not given appellate jurisdiction under Article VII, Section 10 of this Constitution; all matters appealed from the family and juvenile courts, except criminal prosecutions against persons other than juveniles; all civil and probate matters of which the district courts throughout the state have exclusive original jurisdiction; and all civil matters involving more than one hundred dollars, exclusive of interest, of which the district courts throughout the state have concurrent jurisdiction.

> *All appeals of which the courts of appeal have appellate jurisdiction as provided in this Section shall be on both the law and the facts, except where the appeal is limited to questions of law only by any other Section of this Constitution.* (Emphasis ours)
>
> Each court of appeal has supervisory jurisdiction, subject to the general supervisory jurisdiction of the Supreme Court, over all inferior courts in all cases in which an appeal would lie to the court of appeal."

We also quote from Article 2164 of the Code of Civil Procedure of the State of Louisiana:

> "Art. 2164. Scope of appeal and action to be taken; costs
>
> The appellate court shall render any judgment which is just, legal, and proper upon the record on appeal. The court may award damages for frivolous appeal; and may tax the costs of the lower or appellate court, or any part thereof, against any party to the suit, as in its judgment may be considered equitable."

both of which quotations are self-explanatory and provide for the rights of Appellate Courts of the State of Louisiana to decide an appeal on both questions of law and of fact.

Our appeal as was set forth in our original brief filed in the Court of Appeal for the Fourth Circuit of Louisiana was based on both law and fact.

The 7th Amendment to the United States Constitution reads as follows:

"AMENDMENT VII-CIVIL TRIALS

"In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

and the pertinent section of Amendment No. 14 to the Federal Constitution reads as follows:

"AMENDMENT XIV. - CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any

person within its jurisdiction the equal protection of the laws. * * * "

Applicants now contend and have so contended since their petition for rehearing in the Court of Appeal, that this appeal from a District Court of the State of Louisiana to the proper Appellate Court of said State, is violative of the 7th Amendment to the United States Constitution as is amended by the 14th Amendment thereto.

In our opposition brief to the petition for rehearing in the Court of Appeal and in our opposition to the Application for Writs in the Supreme Court of Louisiana, we have pointed out and cited authorities for the fact that this Court has held on a number of occasions and quite recently held that these limitations imposed by the 7th and 14th Amendments apply to proceedings from Federal Courts only and not to proceedings in State Courts, such as is involved herein.

In this connection we cite a number of cases from this Court on this subject and feel as a result thereof that the decisions of the Court of Appeal and of the Supreme Court of Louisiana are eminently correct.

Tannehill v Roberts, 216 So.(2d) 656 - Writs refused in the Supreme Court of Louisiana, 219 So.(2) 176 and Writs refused in the Supreme Court of the United States, (October 13, 1969) 24 L.Ed. (2) 73, 396 U.S. 822.

Lumberman's Mutual Casualty Company v Elbert, 99 L.Ed. 59 (see p. 64), 348 U.S. 48

Fay v New York, 91 L.Ed. 2043 (see pp. 2060-61) 332 U.S. 261

Walker v Sauvinet, 92 U.S. 90, Book 23 P. 678

Maxwell v Dow, 176 U.S. 581, 44 L.Ed. 597 (see pp. 603-4)

New York Central Railroad Company v White, 243 U.S. 187, 61 L.Ed. 667

Wagner Electric Manufacturing Company v Lyndon, 262 U.S. 226, 67 L.Ed. 961 (see p. 964)

Minneapolis & St.L.R.Co. v Bombolis, 241 U.S. 210, 60 L.Ed. 961, 963-965

Mountain Timber Company v Washington, 61 L.Ed. 685 (p. 695), 243 U.S. 219

Palko v Connecticut, 302 U.S. 319, 82 L.Ed. 288

For an extremely full, precise and comprehensive statement of the law as is thus recognized, we quote from *Olsen v Trust Company of Chicago*, 245 Fed.(2) 522 (see page 524) in which case writs were refused by this Court, 355 U.S. 896, 2 L.Ed. (2) 193:

> "1) It is clear there is no federal question involved in the case at bar. The Seventh Amendment of the United States Constitution applies to trials in the United States Courts. Bute v People of State of Illinois, 333 U.S. 640, 657 (footnote), 68 S.Ct. 763, 92 L.Ed. 986. *Trial by jury in civil actions in state courts may be modified by a state or abolished altogether.* Walker v Sauvinet, 92 U.S. 494, 44 L.Ed. 597; New York Central Railroad Company v White, 243 U.S. 187, 208, 37 S.Ct. 247, 61 L.Ed. 667; Wag-

ner Electric Manufacturing Company v Lyndon, 262 U.S. 226, 232, 67 L.Ed. 961.

"2) A denial of trial by jury in a state court is not a denial of due process of law under the Fourteenth Amendment. The Fourteenth Amendment neither implies that all trials must be by jury, nor guarantees any particular form or method of state procedure. Hardware Dealers' Mutual Fire Insurance Company of Wisconsin v Glidden Co., 284 U.S. 151, 158, 52 S.Ct. 69, 71, 76 L.Ed. 214." (Emphasis added)

Since the case of *Tannehill v Roberts,* cited by us supra (p. 5 hereof) is so similar to the issues of this case and since it even stems from the same Court of Appeal and as it involves practically all issues involved herein, including the possible violation of the Louisiana constitutional provisions (supra) and the provision of the pertinent articles of the Louisiana Code of Civil Procedure with Amendments No. 7 and No. 14 of the United States Constitution and since this Honorable Court refused to review these questions by its refusal of writs therein, we feel that this is probably the leading case on the subject.

In passing and even though we feel the constitutional questions raised in this proceeding have been disposed of above, we feel that we cannot but point out that even if we were incorrect in these thoughts, which we most emphatically feel to be correct, that then and even then, Learned Counsel for Applicants has attempted to interpose these questions too late into this pro-

ceeding, having only raised them for the first time on rehearing in the Court of Appeal for the Fourth Circuit of Louisiana.

To this effect we cite to the Court its decisions in the following cases:

Forbes v State Council of Virginia, 54 L.Ed. 534 (see pp 535-536), 216 U.S. 396
Loeber v Schroeder, 149 U.S. 580, 37 L.Ed. 856
Pim v St. Louis, 41 L.Ed. 714, 165 U.S. 273
Bilby v Stewart, 62 L.Ed. 701, 246 U.S. 255
Herndon v Georgia, 79 L.Ed. 1530 (see pp 1532-34) 295 U.S. 440

Since writing the above we have now received copies of applicants' petition for writs in this Court and while we feel that this opposition as above set forth is sufficient for our purposes, we would like to add the following:

DISCUSSION OF APPLICANTS' MORE RECENT AUTHORITIES

If we are correct in interpreting the Court's rules where there is some area of disagreement as to facts, would the Court and Learned Counsel not deem us presumptuous, if, in lieu of restating the introductory paragraph of Petitioners' "Questions Presented" as appears on pages 2 and 3 of their petition, and in lieu of restating the 1st, 2nd and 5th paragraphs of their "Statement of the Case" as appears from page 4-5 of their petition we would refer the Court to the opinion

of the Court of Appeal as appears on page 20 et seq. of said petition to better state our position and more particularly to paragraph 4 on page 22 thereof.

Applicants through Learned Counsel now seem to have leveled their present application, not only at Amendment No. 7 as amended by Amendment No. 14 to the Federal Constitution, but at practically the entire Bill of Rights, and certainly at least at Amendments Nos. 1 and 6 in addition to Amendment No. 7, in spite of their expressed statement of "Questions Presented" as appears on pages 2 and 3 of their application to this Court.

To attempt to reasonably discuss the entire Bill of Rights or even Amendments Nos. 1 and 6 thereof, in addition to Amendment No. 7, as amended by Amendment No. 14, would increase the size of any brief by mathematical progression, so we will attempt to limit this brief in opposition to the application aforesaid — to applicants' stated "Questions Presented".

We would now like to engage in a short discussion of the more recent cases cited by applicants and point out that even if applicants' cases were pertinent to the issues involved herein which we are inclined to doubt, that then and even then this Court's refusal of writs in the *Tannehill v Roberts* case, p. 5 hereof, which was in late 1969 was, of course, more recent than any of applicants' cited decisions.

In their cited case of *Duncan v Louisiana*, 391 U.S. 145, 20 L.Ed. (2) 491, Rehearing Denied 20 L. Ed. (2)

1412-392 U.S. 947, the case presented involved a criminal statute and a misdemeanor trial for battery where the statute attacked provided for penalties up to two years of imprisonment and this Court held that in a case involving a possible penalty of some two years, the 6th Amendment should be applied requiring a trial by jury.

In *Gitlow v New York*, 268 U.S. 652, 69 L. Ed 1138 cited by counsel, although an older case, having been decided in 1925, a criminal statute of the State of New York was involved aimed at punishing sedition and advocacy of overthrow of government, and the Court held that the Statute was not violative of the 1st and 14th amendments of the Constitution, and did not require an actual physical attempt to overthrow the Government in order to remain within the Constitutional limitations.

In the case of *Bloom v Illinois*, 391 U.S. 194, 20 L.Ed. (2) 522, cited by applicants, the case involved criminal contempt where a possible penalty of twenty four months imprisonment could be imposed, and this Court held that under the circumstances a trial by jury should be held under the terms of the 6th and 14th amendments as such a possible punishment certainly could not be held to be merely petty.

In the case of *Slocum v New York Life Insurance Company*, 228 U.S. 364, 57 L.Ed. 879 appearing on page 6 of applicants' petition, the case involved Federal courts and not State courts and, of course, is self-explanatory.

As to the case of *Jacob v City of New York*, 315 U.S. 752, 86 L.Ed. 1166 cited and quoted from in part by applicants, we think it should suffice for our purposes to point out not only does the case involve the Federal Courts, but also involves the Jones Act which should, in our opinion, be amply sufficient to entirely differentiate same from the case before the Court.

It would therefore seem to us that Counsel in citing the authorities above set forth was going somewhat afield from those cases involving trial by civil jury in State courts under the 7th and 14th Amendments to the Constitution.

We do not understand the reason Learned Counsel sets forth on page 16 of his brief what appears to be the paucity of civil jury trials in Louisiana prior to the year 1963 when any mere casual examination would demonstrate the innumerable civil jury trials in Louisiana State Courts that are presently pending and have been tried in the last several years.

Before closing we cannot but express our wonder why applicants in their application for writs, who now attempt to raise questions involving practically the entire Bill of Rights, have chosen to ignore or practically ignore the fact of their untimely raising of any constitutional questions whatsoever until their petition for a rehearing was presented to the Court of Appeal below (see applicants' petition pp. 4 and 5) and at such time as it was too late to raise such questions (see pp. 7-8 hereof), which, of course, was pointed out in both the Appellate Court for the Fourth Circuit of Louisiana and in the Supreme Court of Louisiana.

CONCLUSION

It would, therefore, seem to us that not only has the attempted injection of Federal constitutional questions been brought too late, but that the 7th and 14th Amendments to the United States Constitution have no restrictions which should possibly apply to the judgment of the Court of Appeal for the Fourth Circuit, State of Louisiana, and that applicants' application for writs should be refused.

Respectfully submitted

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CERTIFICATE

I hereby certify that copies of this brief have this day the ____ day of _____, 1971, been served upon C. Ellis Henican, Jr. and Henican, James and Cleveland, Attorneys for Plaintiffs-Applicants, by placing same in the United States mail, addressed to their offices 225 Baronne Building, New Orleans, La. 70112.

_____